



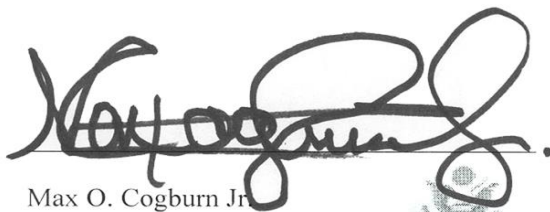
\$96 million, when in fact the company earnings were only \$37 million. Thus, the government appears to contend that the scheme's use and issuance of the 1099s not only perpetuated the fraud on the affiliates, it also impeded the operations of the IRS. The government further argues that defendant's constructive receipt theory is defective as not only can defendant not show that the money was "set apart" for each affiliate, as defendant could not set apart funds that were never received.

A motion to dismiss is governed by Rule 12(b)(3)(B), Federal Rules of Criminal Procedure. That rule provides that the court may dismiss a count where the indictment "fails to invoke the court's jurisdiction or to state an offense." Fed.R.Crim.P. 12(b)(3)(B). An indictment is defective if it alleges a violation of an unconstitutional statute, or if the "allegations therein, even if true, would not state an offense." United States v. Thomas, 367 F.3d 194, 197 (4th Cir. 2004). Here, the court finds no reason to dismiss Count Four. The motion will be denied and defendant may renew the motion at the conclusion of the government's evidence.

### **ORDER**

**IT IS, THEREFORE, ORDERED** that defendant's Motion to Dismiss Count Four (#68) is **DENIED** without prejudice.

Signed: June 20, 2016

  
Max O. Cogburn Jr.  
United States District Judge